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IN THE

Supreme Court of the United States

October Term, 1970.

No. 378

THOMAS LEONE,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Department.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1970

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In the

Supreme Court of the United States

October Term, 1970.

No.

Thomas Leone,

Petitioner,

against

The People of the State of New York,

Respondent.

Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Department.

The petitioner, Thomas Leone, hereby petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered herein on February 25, 1970, which affirmed the judgment of conviction of the Dutchess County Court of June 12, 1968, for manslaughter in the second degree under the former Penal Law of the State of New York.

Opinions Below.

Neither the judgment of the County Court nor the opinion of the Appellate Division have been reported; they are appended hereto as appendices A and B respectively. The opinion of the Court of Appeals of the State of New York denying defendant's request for permission to appeal to the Court of Appeals has not been reported and is appended hereto as appendix C.

Jurisdiction.

The order sought to be reviewed was made and entered on February 25, 1970. Permission to appeal to the Court of Appeals was denied on April 16, 1970. The statutory provision believed to confer on this court jurisdiction to review the order in question is 28 U.S.C., Sec. 1254 (1).

Questions Presented For Review.

1. Were petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution violated by the use of a confession obtained from him after his request for the assistance of counsel had been denied?

2. Was the petitioner denied a fair trial by the trial court's instruction that petitioner had a continuing burden of proving that the homicide was excusable thereby shifting the burden of proof?

3. Were petitioner's fundamental rights to a fair trial violated by the failure of the trial court to define the crime for which petitioner was tried?

4. Was petitioner denied a fair trial by the refusal of the trial court to instruct the jury that manslaughter in the heat of passion could not occur unless petitioner's acts were also at least culpably negligent?

Constitutional Provisions Involved.

United States Constitution, Fifth Amendment:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *."

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Statement of the Case.

On August 10, 1967, Dorothy Minard Brown died (R. 220)* as a result of an acute subdural hematoma (R. 186, 192, 223, 358, 385, 386). The injury which caused the acute subdural hematoma occurred at the defendant's home on August 10, 1967. The defendant told his wife to call an ambulance (R. 81, 443), which she did (R. 88, 443). When the ambulance arrived, the decedent was lying unconscious (R. 116) on the living room floor in front of the couch (R. 115, 123). The only two witnesses to the occurrence were the defendant and his wife.

The Confession Evidence:

The defendant admitted he struck the decedent to William Lewis (R. 122), John Coons (R. 115), Elizabeth Steele (R. 127) and Dr. Joseph Velasco (R. 141). Elizabeth Steele testified that the defendant told her that "he had struck her and that she had fallen down" (R. 128). Dr. Velasco testified that the defendant told him:

> "* * * that she had been drinking and that she was at his home and she had awakened his wife and

*References to the Record on Appeal are cited as (R.); references to the Huntley Hearing are cited (H.H.); references to Post Trial Motion are cited (P.T. Mot.

> she was threatening to awake the children, and she was using obscene language and that he asked her to please keep quiet and she didn't. She kept screaming hysterically as she was under the influence of alcohol and he slapped her several times across the face to try to keep her quiet and she slipped and or fell and struck her head" (R. 141).

Investigator Hallock testified that the defendant told him that the decedent called him and his children obscene names (R. 156) and he slapped the decedent three times (R. 156), after which she slumped over in the chair (R. 157), and that he picked her up and laid her on the couch (R. 157). At the Huntley Hearing, however, Investigator Hallock stated he *did not* "in those words" (H.H. 34) tell the defendant that he had a right to counsel present then and there (H.H. 34) and that if the defendant wanted counsel then and there that he wouldn't talk with him until counsel arrived (H.H. 34). At the Huntley Hearing Mrs. Leone testified that the defendant asked Trooper Bolander for a lawyer (H.H. 51-53), and that the trooper told the defendant that he was not charged with anything as of yet (H.H. 52). She testified that Investigator Hallock came in after this conversation (H.H. 54). On rebuttal, Trooper Bolander testified that he did not recall being asked to call a lawyer (H.H. 55). On cross examination at the Huntley Hearing, Trooper Bolander was asked:

> "Q. Trooper, you have no recollection as to whether or not Mr. Leone asked for an attorney is that your testimony? A. Yes, sir" (H.H. 56).

At the trial, however, Trooper Bolander testified that the defendant did not ask for an attorney (R. 149).

B. Eyewitness Evidence:

Mary Leone and the defendant testified that the defendant and the decedent arrived at the Leone home at

3 a.m. on August 10, 1967 (R. 55, 441); that the decedent was drunk (R. 94, 95, 102, 442), hysterical (R. 58, 60, 99, 441, 442), shouting curses (R. 58, 60, 441, 442) and that the defendant struck her to quiet her down (R. 69, 442). Mary testified that Tommy slapped the decedent three times (R. 66); Tommy testified he slapped the decedent two times (R. 476). Both testified that after Dorothy was slapped, Mary gave her a wash cloth (R. 70, 442) which Dorothy threw across the table (R. 70, 442) or put her head on the table (R. 70) and said she didn't feel well (R. 77, 442) and wanted a doctor (R. 77, 442). While Mary was calling a doctor (R. 79, 80, 442) Tommy was helping Dorothy to the living room couch (R. 79, 80, 442). Dorothy did not want to lie down on the couch. She struggled and screamed that she did not want to lie down (R. 102, 442). Tommy picked her up and put her on the couch (R. 81, 442). Dorothy said that she did not "want to stay in this place tonight" (R. 443). Tommy left Dorothy on the couch and started toward the kitchen (R. 81, 443). Mary and Tommy heard a thud (R. 81, 443). Tommy ran back to Dorothy who had fallen off the couch and was lying on the floor (R. 81, 82, 443). Tommy told Mary to call an ambulance (R. 81, 443). Dorothy had taken her pills (R. 439) and had been drinking heavily (R. 438). The pills made her drunk after a couple of drinks and she would get hysterical and stagger (R. 426).

C. Medical History: Propensity for Drunkenness and Violence Evidence:

Dr. Ralston testified that he had treated Dorothy in 1965 (R. 324, 325) when she was hospitalized in Horton Memorial Hospital (R. 325). He stated that her prior hospitalizations would be of medical significance to him in this case (R. 328). Defendant's Exhibits "I," "J," and "K," Dorothy's hospital record for December, 1964,

January, 1965, and March, 1965, were received in evidence (R. 329). Those records disclosed that in December, 1964, the decedent suffered a cerebral concussion and a fracture of the right temple bone and a bone deep laceration extending from the right frontal region through the temple region almost to the occipital region and lost consciousness as a result of an automobile accident; in January of 1965 the decedent was readmitted to the hospital and given a general anesthetic and operated on to remove glass from her head; and that in March, 1965, the defendant suffered a cerebral concussion, a *petit mal* epileptic seizure, a fracture of the right parietal bone and she was bleeding from the right ear for three days and lost consciousness, as a result of being pushed through a door and falling down a flight of stairs and striking her head. It was also disclosed that on June 8, 1967, the decedent was found unconscious in an automobile and that Trooper Czapeicki was unable to arouse or awaken her (R. 380, 384). Trooper Czapeicki called an ambulance and Dorothy was taken to the hospital. (R. 381).

Benjamin Kumin testified that he had filled a prescription for thirty equagesic tablets for Dorothy on May 13, 1967. These were the pills referred to by Tommy (R. 439) and the pills Dorothy's sister, Emily Doolittle, testified that Dorothy took (R. 287).

Emily Doolittle testified that her sister Dorothy got violent when drunk (R. 274, 275); that Dorothy was drunk most of the time (R. 274, 275), and the only way she could quiet Dorothy was by slapping her (R. 275). Amey Kramer, Dorothy's mother, testified that: Dorothy was nasty and wanted to fight with her when drunk (R. 306, 310); Dorothy drank quite a bit (R. 305); and, when drunk, Dorothy was always argumentative and violent (R. 312).

D. Expert Medical Evidence:

Dr. Velasco testified that the external force needed to produce an acute subdural hematoma "would have to be severe" (R. 138), "with a very, very violent blow such as a fist delivered with high velocity, or a baseball bat or falling on the floor suddenly and striking one's head on the floor * * *" (R. 139).

Dr. Dreyfus testified that a slap across the face was sufficient to precipitate an acute subdural hematoma (R. 188). He testified that he did not believe a fall from a couch one foot high could produce the injury, because he could not imagine how a person could fall off the couch and strike his head with sufficient force to cause this kind of injury (R. 193-194). He also testified that the acute subdural hematoma was caused by a blow to the head or a fall to the ground (R. 210).

Dr. Weiss testified that the injuries found on the decedent could have been caused by a blow from a man's hand depending on the severity (R. 221). He also testified that, given a hypothetical situation in which the victim was slapped and she either fell to the floor or put her head on the table and complained of not feeling well and she was carried to and placed on the couch in an unconscious state and she then rolled off the couch and dropped to the floor, the acute subdural hematoma was caused by these blows. He did not indicate which of the blows—the slaps, the alleged fall after the slaps, or the fall from the couch—was the competent producing cause of death (R. 223-224).

Dr. Ralston testified that persons who have an acute subdural hematoma "as a rule are in a coma from the moment of the accident * * *" (R. 331). He testified that neither a backhanded slap nor three backhanded slaps to the face delivered from a distance of one foot

to a foot and a half would be a competent producing cause of an acute subdural hematoma (R. 332-333) and that striking the head in a fall from a one-foot-high couch could be a competent producing cause of the acute subdural hematoma (R. 348, 351-352). Dr. Ralston also testified that the marks on the body of the victim were consistent with the fact that the victim fell (R. 350). He testified that if the victim fell to the floor and struck her head immediately after being slapped the result would be the same as falling off the couch and striking her head (R. 364,365). Dr. Ralston also testified that, if the victim fell down and struck her head on the floor and then was picked up and placed on the couch and then fell off the couch, he would not be able to determine which of the two falls was the cause of death (R. 376-377).

Dr. Bellamy testified that the external medical findings set forth in the Vassar Brothers' Hospital report were consistent with a fall to the floor (R. 388). He testified that either a moderate backhand slap to the face or a fall to the floor from a couch might be a competent producing cause of an acute subdural hematoma in a woman who was a known alcoholic and had a fatty liver (R. 388-389); but, of the two possible causes of an acute subdural hematoma, the fall to the floor was the more probable (R. 391). Dr. Bellamy reiterated on cross examination that, if he were to assume that the victim was struck in the face and fell to the floor striking her head, he would say that striking her head on the floor was the cause of death (R. 402-403).

E. Other Evidence:

The only other evidence was that of Robert Heffernan who testified that on the evening of August 9, 1967, he saw Dorothy yell at the defendant (R. 30) and heard

something that sounded like a slap (R. 23). Mr. Heffernan was across the street, could not see the defendant and Dorothy, at the time of the slap, because the door was closed, but he said he could hear the slap through the transom (R. 23).

F. Four Errors Raised on this Petition:

1. Defendant's confession to Investigator Hallock was made after his request to confer with counsel had been denied by Trooper Bolander (H.H. 51-53, 55). The confession should not have been received in evidence.

2. The court did not define manslaughter in its charge to the jury. That error was exacerbated by the court's charge on specific intent (R. 593) since specific intent is not relevent in a manslaughter case.

3. The court charged that the burden of proving excusable homicide shifted to the defense (R. 590) and defendant had a continuing burden of proof as to that issue (R. 591).

4. The court limited its charge on culpable negligence to the first count of the indictment (R. 590) and thereby instructed the jury that proof of any act committed in the heat of passion, whether culpably negligent or not was sufficient proof of defendant's guilt under the second count of the indictment.

Defendant was convicted after a jury trial, on the second count of a two count indictment charging petitioner with manslaughter in the second degree. On June 12, 1968, he was sentenced by the County Court, Dutchess County, to serve term of imprisonment for two and one-half to five years. The notice of appeal was duly filed and on November 21, 1969 a certificate of reasonable doubt was granted in State Supreme Court. Bail was fixed in the amount of $10,000. On November 21, 1969,

defendant was admitted to bail. Prior to his release on bail petitioner had been in jail serving his sentence. On February 25, 1970, the judgment of conviction was unanimously affirmed by the Appellate Division, Second Department. Thereafter defendant requested permission to appeal his conviction to the Court of Appeals. On April 16, 1970 decision of the Hon. Francis Bergan denied defendant's request for permission to appeal to the Court of Appeals. Defendant presently remains on bail pursuant to the June 11, 1970 order of the Appellate Division, Second Department of the New York State Supreme Court staying enforcement of the judgment of conviction and continuing him on bail pending certiorari. Defendant has been approved for parole and if returned to prison would be eligible for parole in approximately two months.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the use of a confession obtained from him after his request for the assistance of counsel had been denied.

At the Huntley Hearing it was disclosed that Trooper Bolander arrived at Northern Dutchess Hospital at approximately 4:50 a.m. (H.H. 6). After speaking with Dr. Velasco, Trooper Bolander spoke with the defendant (H.H. 6). The defendant made an oral confession to Trooper Bolander without benefit of the *Miranda* warnings (H.H. 7). That statement was suppressed (H.H. 62). Defendant was then given partial *Miranda* warnings by Trooper Bolander (H.H. 8, 12, 13). After Trooper Bo-

lander had given the defendant the partial *Miranda* warnings, the defendant made no further admission to him (H.H. 8). Trooper Bolander took the defendant into custody and went to the Rhinebeck State Police barracks (H.H. 8). Trooper Bolander stated that he did not recall the defendant asking for permission to call his lawyer, Thomas Vasti (H.H. 15-16).

Mrs. Leone testified that the defendant asked Trooper Bolander for a lawyer (H.H. 51-53), and that the trooper told the defendant that he was not charged with anything as of yet (H.H. 52). She testified that Investigator Hallock came in after this conversation (H.H. 54). The defendant then gave an oral confession to Investigator Hallock (H.H. 26-28). On rebuttal Trooper Bolander testified that he did not recall being asked to call a lawyer (H.H. 55). On cross examination Trooper Bolander was asked:

> "Q. Trooper, you have no recollection as to whether or not Mr. Leone asked for an attorney is that your testimony? A. Yes, sir" (H.H. 56).

Even though there was testimony that the defendant had asked Trooper Bolander to call a lawyer (H.H. 52-54) and there was testimony that Trooper Bolander had no recollection as to whether or not Mr. Leone asked for an attorney (H.H. 56), the court found, beyond a reasonable doubt, as required by *People v. Huntley*, 15 N. Y. 2d 72 (1965), that defendant's confession to Investigator Hallock was voluntary and that defendant did not request a lawyer (R. 6). The defendant had "let the cat out of the bag by confessing" to Trooper Bolander. *United States v. Bayer*, 331 U. S. 532 (1947), at 540; see, also, *Darwin v. Connecticut*, 391 U. S. 346 (1968), concurring opinion. The following argument made on defendant's behalf at the conclusion of the Huntley Hearing demonsfrates defendant's dilemma:

"I further submit to the court that any statements that were made by Mr. Leone to Patrolman Bolander after this initial conversation without the *Miranda* warnings, in colloquial language, "let the cat out of the bag", and once the cat is out of the bag, Your Honor, you can't get the cat back in the bag. But what Mr. Leone attempted to do at the State Police barracks was at least build a corral around this lost cat by contacting his lawyer and the testimony, I submit, is unrebutted that Mr. Leone did ask for his lawyer and was not provided with one. Therefore, I respectfully urge the court to exclude any statements that were subsequently made to Investigator Hallock whether or not the *Miranda* safeguards were given by Investigator Hallock" (H.H. 58).

Under the circumstances disclosed by the record, the defendant submits that voluntariness was not shown by a preponderance of the evidence, let alone beyond a reasonable doubt. The finding of fact that the defendant did not request the assistance of counsel (H.H. 52-56) is contrary to the evidence as a matter of law.

Once the defendant has asked for counsel, all interrogation must cease until the attorney is present. *Miranda v. Arizona*, 384 U. S. 436 (1966); *Escobedo v. Illinois*, 378 U. S. 478 (1964); *People v. Donovan*, 13 N. Y. 2d 148 (1963).

II.

Petitioner's fundamental rights to a fair trial were violated by the failure of the trial court to define the crime for which petitioner was tried.

Under the former Penal Law homicide was dealt with in Article 94. Section 1042 defined homicide as "* * * the killing of one human being by the act, procurement or

omission of another." The different kinds of homicide are listed in Section 1043 as "1. murder; or, 2. manslaughter; or, 3. excusable homicide; or, 4. justifiable homicide." Manslaughter is defined in Section 1049 which reads:

> "In a case other than one of those specified in sections ten hundred and forty-four, ten hundred and forty-six and ten hundred and forty-seven, homicide, not being justifiable or excusable, is manslaughter."

Thus, in order to ascertain the meaning of manslaughter, it is necessary to examine the three sections referred to in the definition of manslaughter and Sections 1054 and 1055 which define excusable homicide and justifiable homicide.

Section 1044 defines murder in the first degree. Section 1046 defines murder in the second degree. Section 1047 covers the Hamilton-Burr situation and classifies as murder in the second degree a homicide resulting from a duel arranged in New York State but fought out of the state.

Manslaughter in the first degree is defined in Section 1050 and manslaughter in the second degree is defined in Section 1052. The pertinent provisions of that section are:

> "Such homicide is manslaughter in the second degree, when committed without a design to effect death:
>
> "2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or,
>
> "3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."

The court charged Penal Law, Section 1041, which articulates the requisite proof of death, and Sections 1042, 1043, 1054 and 1052 (2) and (3) in their entirety (R. 586-588). The court did not charge Section 1049 which defines manslaughter. Thus, manslaughter was not defined in the court's charge. The court did charge:

> "Any killing is homicide—either murder or manslaughter—unless the act is excusable or justifiable" (R. 591).

That statement does not articulate the provisions of Section 1049; it is merely a restatement of Section 1043. The crucial difference between Section 1049 and Section 1043 is that Section 1049 defines manslaughter by a process of elimination. "Thus murder first, murder second and dueling must be excluded before you arrive at that homicide which not being justifiable or excusable constitutes manslaughter.

Section 1043 simply tells you that there are four different types of homicide. The court's charge does no more. It is couched in the disjunctive. Thus, if you determined that the homicide was not excusable or justifiable you would still be left with murder *or* manslaughter. The court defined only culpable homicide, not manslaughter.

Manslaughter does not require any specific intent. Manslaughter is culpable homicide committed without a design to effect death. *People v. Beckwith*, 103 N. Y. 360 (1886); *Slattery v. People*, 58 N. Y. 354 (1874). A homicide may only be classified as manslaughter when there is no design to kill. *People v. Beckwith, supra.* The court erred in charging:

> "so that in order to find the defendant guilty of manslaughter in the second degree under either subdivision, it is necessary that you find that he had a specific intent to commit the crime charged" (R. 593).

The court's failure to define manslaughter, coupled with the court's charge on specific intent virtually constituted a charge on murder in the second degree (Section 1046, Penal Law).

Notwithstanding the failure of defense counsel to except to the court's charge, the failure of the court to define manslaughter substantially prejudiced defendant's rights, and "error so fundamental, so substantial" requires a new trial in the interest of justice. *People v. Creasy*, 236 N. Y. 205 (1923); *People v. Butts*, 14 A. D. 2d 486 (4th Dept. 1961); *Blackburn v. Alabama*, 361 U. S. 199 (1960); *Thompson v. Louisville*, 362 U. S. 199 (1960).

III.

Petitioner was denied a fair trial by the refusal of the trial court to instruct the jury that manslaughter in the heat of passion could not occur unless petitioner's acts were also at least culpably negligent.

During the trial, the defense urged the defense of excusable homicide (R. 227-229, 235, 236, 486, 545). That defense was also raised by post trial motion (P.T. Mot. 9-13). Section 1054 of the former Penal Law defines excusable homicide as follows:

> "Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent."

Once the defense of excusable homicide had been raised, it was necessary for the court to charge excusable homicide and define "ordinary caution."

In *People v. Angelo*, 246 N. Y. 451 (1927), the court stated that if the homicide is committed by accident or misfortune in doing a lawful act by lawful means with *ordinary caution* without unlawful intent, the homicide is excusable. There the court stated at page 453:

> "What is meant by 'ordinary caution' is defined by Section 1052. Where the killing is the result of 'any act, procurement or culpable negligence'—not constituting the crime of murder or manslaughter in the first degree—the defendant is guilty of manslaughter in the second degree. 'Ordinary caution' must mean the absence of culpable negligence, otherwise a gap might exist—a case of homicide not being excusable under 1054, yet not criminal under the definitions of §§ 1044, 1046, 1050 and 1052. But 1043 is intended to include every species of homicide. The ultimate question, therefore, is as to the intent of the legislature in using the two words 'culpable' and 'negligence.'"

From the outset of the case (R. 33-36) the defense contended that a charge on culpable negligence was proper on the trial of an indictment under Section 1952 (2) of the former Penal Law. The court disagreed (R. 35, P.T. Mot. 12). At the end of the People's case (R. 237), at the end of the entire case (R. 486) and prior to the court's charge (R. 541) the defense requested that culpable negligence be charged to the jury. The court's charge on culpable negligence (R. 587, 589, 590) was incomplete and limited in application to the first count of the indictment. The defense requested the court to charge:

> "With regard to the issue of culpable negligence, the defendant requests the court to charge that lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness however serious the consequence may happen to be do not constitute culpable negligence. There must exist in the mind of the accused, at the time of the act or omission, a consciousness of the probable consequences of the act and a wanton disregard of them" (R. 601).

The court refused to charge as requested. The court's refusal constituted error. *People v. Angelo*, 246 N. Y. 451 (1927); *People v. Pace*, 220 App. Div. 495 (4th Dept. 1927); *People v. Joseph*, 11 Misc. 2d 219 (Co. Ct., Kings Co., 1958).

By failing to include the second count of the indictment under its charge on culpable negligence, the court was charging that any act committed by the defendant in the heat of passion, whether the act was culpably negligent or not, was sufficient in order to find the defendant guilty on the second count of the indictment. By its failure and refusal to include the second count of the indictment in its charge on culpable negligence, the court was in effect instructing the jury that the defense of excusable homicide was unavailable to the defendant on the second count. Section 1054 of the former Penal Law in no way excluded the defense of excusable homicide on a charge of manslaughter in the heat of passion.

IV.

Petitioner was denied a fair trial by the trial court's instruction that petitioner had a continuing burden of proving that the homicide was excusable thereby shifting the burden of proof.

The defendant urged the defense of excusable homicide during the trial (R. 227-229, 235, 236, 486, 545) and after trial (P.T. Mot. 9-18).

In explaining the law on the defense of excusable homicide, the court charged:

> "Homicide is excusable when committed by accident and misfortune, in doing any lawful act, by lawful means, with ordinary caution, and without any unlawful intent" (R. 587).

"Whether such homicide was justifiable or excusable is a matter of defense and the burden of going forward with evidence to show justifiableness or excusability shifts to the defendant" (R. 590).

"Whether or not the defendant avails himself of his right to go forward with the evidence, the overall burden of establishing the guilt of the defendant beyond a reasonable doubt never shifts from the people who must bring the case within the statutory definition of manslaughter in the second degree" (R. 590-591).

"Therefore, in order to state it another way, while the burden of showing an excuse for a homicide is upon the defendant, the later is not required to prove the fact beyond a reasonable doubt, it being sufficient, if, upon all the evidence, a reasonable doubt is raised as to the existence of the excuse" (R. 594).

The defense requested the court to charge the jury:

"* * * that where the defense is excusable homicide, the burden imposed by §1041 of the Penal Law still rests on the People and if the jury has a reasonable doubt as to whether the homicide was excusable it should acquit" (R. 604).

The defense does not take issue with that portion of the court's charge which paraphrases Section 1054 of the former Penal Law and that portion of the court's charge which paraphrases. *People v. Sandgren*, 302 N. Y. 331 (1951) at page 334.

The defendant's request to charge was prompted by the court's following amplification of Section 1054 and *People v. Sandgren, supra.*

"Therefore, in order to state it another way, while the burden of showing an excuse for a homicide is upon the defendant, the latter is not required to prove the fact beyond a reasonable doubt

it being sufficient if, upon all the evidence a reasonable doubt is raised as to the existence of the excuse" (R. 591).

The defendant's request to charge was intended to make it clear to the jury that the prosecutor's burden of proving his case beyond a reasonable doubt, in accordance with Section 1041 of the Penal Law, continued to be the quantum of proof necessary in order to convict the defendant. Since the defendant had put in evidence of excusable homicide the jury should have been instructed that it was the prosecution's burden to prove beyond a reasonable doubt that the homicide was not excusable. *In re Winship*, 90 S. Ct. 1068 (1970). Instead, the court instructed the jury that the defendant had to prove that fact (although not beyond a reasonable doubt) and stated that it was sufficient if upon all the evidence a reasonable doubt was raised as to the existence of the excuse. Thus, the burden was permanently shifted from the prosecution to the defense and defined as something less than proof of excusable homicide beyond a reasonable doubt as to the existence of the excuse.

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, *supra*.

The court's charge and refusal to charge left the jury with the impression that the defendant had a continuing burden of proof with regard to excusable homicide. This was error. *People v. Downs*, 123 N. Y. 558 (1890); *People v. Stern*, 201 App. Div. 687 (1st Dept. 1922), appeal dismissed 237 N. Y. 514 (1923); *People v. Riordan*, 117 N. Y. 71 (1889); *People v. Saudgren*, 302 N. Y. 331 (1951). See *People v. Elmore*, 277 N. Y. 397 (1938).

CONCLUSION.

This court should grant certiorari and the order below should be reversed.

Poughkeepsie, New York, July . . . 1970.

Respectfully submitted,

PETER L. MAROULIS,
Attorney for Petitioner,
11 Cannon Street,
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(914) 471-6050.

Appendix A.

"* * * therefore, on the second count of the indictment to which you were found guilty by a jury of manslaughter in the second degree, a felony, in violation of Section 1052, Subdivision 2, of the Penal Law of the State of New York, it is the sentence of this Court that you be sentenced to an indeterminate sentence in state's prison the minimum of which shall be two and a half years and the maximum of which shall be five years, that you be committed to the custody of the State Department of Correction and delivered to Sing Sing Prison forthwith and dealt with according to the law pertaining to this sentence". (sentencing minutes, p. 17).

Appendix B.

Order on Appeal From Judgment of Conviction.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 25, 1970

Hon. George J. Beldock
Presiding Justice
Hon. Marcus G. Christ
Hon. Arthur D. Brennan
Hon. Samuel Rabin
Hon. James D. Hopkins
Associate Justices

The People of the State of New York,

Respondent,

vs.

Thomas Leone:

Appellant.

In the above entitled action, the above named Thomas Leone, defendant in this action, having appealed to this court from a judgment of the County Court, Dutchess County, rendered June 12, 1968; and the said appeal having been submitted by Peter L. Maroulis, Esq., of counsel for the appellant, and by Joseph L. Spiegel, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

Ordered that the judgment appealed from is hereby unanimously affirmed.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Appendix C.

Certificate Denying Leave.

COURT OF APPEALS.

STATE OF NEW YORK.

Before:

Hon. Francis Bergan, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

THOMAS LEONE,

Defendant-Appellant.

I, FRANCIS BERGAN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
April 16, 1970

/s/ FRANCIS BERGAN
Associate Judge